Supreme Court, U.S.
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No. 95-816

# In the Supreme Court of the United States

OCTOBER TERM, 1995

ARTHUR J. MIER, PETITIONER

*v.*

GLEN W. VAN DYKE, ADJUTANT GENERAL, ARIZONA ARMY NATIONAL GUARD, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, does not authorize judicial consideration of a National Guard technician's challenge to a personnel action integrally related to the military's structure.

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## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-3 to A-14) is reported at 57 F.3d 747. The order of the district court (Pet. App. A-15 to A-17) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 9, 1995. A petition for rehearing was denied on August 24, 1995. Pet. App. A-1 to A-2. The petition for a writ of certiorari was filed on November 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is a Hispanic civil service technician employed in the Arizona Army National Guard (ARNG). National Guard technicians are full-time, uniformed employees who render services that advance the Guard's mission, such as maintenance of military equipment and facilities, support of aircraft operations, and clerical functions. See *Jorden* v. *National Guard Bureau*, 799 F.2d 99, 101 (3d Cir. 1986), cert. denied, 484 U.S. 815 (1987).[1]

National Guard technicians have a hybrid employment status. They are federal civilian employees under the authority and control of their respective state adjutant generals; they are also members of the National Guard of the United States. See note 1, *supra*. Petitioner's position requires him to serve in a military capacity as a uniformed, commissioned Army officer not on active duty, and in a civilian capacity as a supply management officer responsible for providing and maintaining supplies for the ARNG.

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[1] The National Guard of the United States is a reserve component of the Army and Air Force, see 10 U.S.C. 101(11) and (13) (Supp. V 1993), 32 U.S.C. 709(d). It is "an integral part of the first line defenses of the United States," 32 U.S.C. 102, that provides "trained units and qualified persons available for active duty in the armed forces in time of war or national emergency and at such other times as the national security requires." 10 U.S.C. 262. The command relationship among National Guard members is identical in structure to the command relationship among its active duty federal counterparts. See generally *Perpich* v. *Department of Defense*, 496 U.S. 334, 345-354 (1990); *Gilligan* v. *Morgan*, 413 U.S. 1, 7 (1973); E. Roy Hawkens, *The Justiciability of Claims Brought By National Guardsmen Under the Civil Rights Statutes*, 125 Mil. L. Rev. 99, 102-105 (1989).

In order to remain in his civilian position, petitioner must be a member of the ARNG and hold the commensurate federal military position. See 32 U.S.C. 709(b); Pet. App. A-7.

2. In 1992, petitioner brought this suit against the ARNG and the Department of the Army (respondents) under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that respondents discriminated against him on the basis of race, color, and national origin. Petitioner alleged that respondents denied him military promotions, investigated him for alleged wrongdoing, and placed him on involuntary administrative leave, solely because of his race. He also alleged that respondents retaliated against him for having filed an administrative discrimination complaint with the Army in 1986. Pet. App. A-7.

3. The district court dismissed the action. First, the court held that it lacked jurisdiction over petitioner's claims because Title VII "is not applicable to uniformed members of the armed forces" (Pet. App. A-16), and the "military aspect" of petitioner's position "predominate[s]" (*ibid.*) in his Title VII suit. Second, the court held that petitioner's claims were premature because he had not yet exhausted available intramilitary remedies. *Id.* at A-17. Finally, the court held that petitioner's claims were not justiciable as a prudential matter in light of the extent of military expertise and discretion involved in the challenged decisions, the danger of unwarranted judicial interference with the military function, and the availability of administrative remedies. *Ibid.*

4. The court of appeals affirmed.[2] The court observed (Pet. App. A-9) that a variety of employment actions involving military personnel, including National Guard members, are not judicially reviewable. In those contexts, separation of powers concerns counsel against judicial interference with the "relationship between enlisted military personnel and their superior officers . . . [which] is at the heart of the necessarily unique structure of the Military Establishment." *Ibid.*

Construing circuit precedent,[3] the court concluded that "[b]ecause Guard technicians are in a hybrid job entailing both civilian and military aspects, * * * Title VII coverage of civilians employed by the military encompasses actions brought by Guard technicians except when the challenged conduct is integrally related to the military's unique structure." Pet. App. A-11. Where the challenged personnel action is "inherently military" (*id.* at A-10), the

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[2] During the pendency of petitioner's appeal, another military promotion board convened, and petitioner was promoted to the rank of major. Gov't C.A. Br. 10-11.

[3] See *Christoffersen* v. *Washington State Air National Guard*, 855 F.2d 1437, 1444 (9th Cir. 1988) (suit brought by National Guard technician under 42 U.S.C. 1983 challenging discharge decision by the Guard and termination from technician employment is not justiciable because judicial review "would seriously impede the military in performance of its vital duties"), cert. denied, 490 U.S. 1098 (1989); *Gonzalez* v. *Department of the Army*, 718 F.2d 926, 928 (9th Cir. 1983) (Title VII applies to civilian employees of the military, but not to military personnel); *Bledsoe* v. *Webb*, 839 F.2d 1357, 1360 (9th Cir. 1988) (Title VII claim challenging refusal to allow a female civilian employee to embark on a naval carrier is not so "inherently military" as to be nonjusticiable).

court held, a Guard technician's claim is not justiciable.

Applying that test, the court affirmed the dismissal of petitioner's Title VII suit. The court determined that petitioner's allegation that respondents discriminatorily failed to promote him to the rank of major "is one of the most obvious examples of a personnel action that is integrally related to the military's structure" (Pet. App. A-12) and is not, therefore, reviewable under Title VII. The court further held that "[b]ecause [petitioner's] suspension from civilian promotion resulted from denial of the military promotion, the suspension likewise cannot be reviewed." *Ibid.* Similarly, the court held, petitioner's retaliation claims are unreviewable, because they were linked to respondents' promotion and suspension decisions. *Id.* at A-13. Finally, the court held that petitioner's contention that respondents discriminated against him when they investigated him for alleged wrongdoing was not reviewable under Title VII because "[i]nvestigation is an act central to the military's unique concerns regarding discipline and control." *Ibid.*[4]

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[4] In a concurring opinion, Judge Rhymer stated that the "only issue before us, and all that we rightfully decide, is whether a Guard technician's challenge to personnel actions integrally related to the military's unique structure is cognizable under Title VII. For the reasons [set out in the majority opinion], I agree that such a challenge fails." Pet. App. A-14.

Judge Reinhardt filed an opinion concurring in part and dissenting in part. He agreed that National Guard technicians may not bring Title VII claims challenging decisions that are integrally related to the military aspect of their job. Pet. App. A-13. He would have reversed the district court's dismissal of petitioner's action, however, and remanded the case for further factual development. *Id.* at A-14.

## ARGUMENT

1. Petitioner urges the Court to grant review in this case in order to consider "whether Title VII * * * applies to National Guard technicians." Pet. 4. The court of appeals expressly held, however, that the position of National Guard technician *is* covered by Title VII. Pet. App. A-6, A-11. The court rejected petitioner's particular claims because they involve conduct that is "integrally related to the military's unique structure." *Id.* at A-11. The question of statutory coverage of National Guard technicians is therefore not presented in this case.[5] Even if disagreement existed among the courts of appeals regarding the applicability of Title VII to persons in petitioner's position, this case would not implicate that conflict.

Petitioner is, in all events, incorrect in asserting that a circuit conflict exists regarding the applicability of Title VII to the position of National Guard technician. See Pet. 5-8, citing *Taylor* v. *Jones*, 653 F.2d 1193 (8th Cir. 1981); *Stinson* v. *Hornsby*, 821 F.2d 1537 (11th Cir. 1987), cert. denied, 488 U.S. 959 (1988); *Thornton* v. *Coffey*, 618 F.2d 686 (10th Cir. 1980). In *Taylor* v. *Jones*, the plaintiff had served in the Arkansas Army National Guard both as a recruiter and as a mailroom clerk. 653 F.2d at 1197. The court of appeals held that she was protected under Title VII in her capacity as mailroom clerk, *id.* at 1198, but that she could not invoke Title VII with regard to alleged discrimination incident to her duties as a recruiter. *Id.* at 1200. In the latter capacity, the court observed,

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[5] Petitioner appears to acknowledge as much when he argues that "[t]o the extent the Ninth Circuit found Title VII applicable, its opinion should be affirmed." Pet. 24.

the plaintiff was on full-time military duty with the Guard, was under the command of state military authority, and was subject to court-martial. *Ibid.* In *Taylor*, as in the present case, the court thus found that Title VII does not afford Guard members protection in contexts that are distinctly military in nature. *Ibid.*[6]

In *Stinson* v. *Hornsby*, the plaintiff was on full-time military duty with the Alabama National Guard, pursuant to 32 U.S.C. 502(f),[7] during the period in which the alleged misconduct occurred. 821 F.2d at 1538-1539. Following *Taylor* v. *Jones*, and *Gonzalez* v. *Department of the Army*, 718 F.2d 926 (9th Cir. 1983), the court found that the plaintiff's role and susceptibility to military discipline during the period at issue placed him in the status of a member of the "armed forces," rather than that of an "employee,"

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[6] The court in *Taylor* went on to hold that the plaintiff was entitled to relief under 42 U.S.C. 1981 for intentional discrimination that occurred in the course of her duties as a recruiter. 653 F.2d at 1200-1202.

[7] Section 502(f) provides, in pertinent part:

> Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may—
>
> (1) without his consent, but with the pay and allowances provided by law; or
>
> (2) with his consent, either with or without pay and allowances;
>
> be ordered to perform training or other duty in addition to [his regularly scheduled drills and periods of active duty].

and that Title VII relief was therefore unavailable. 821 F.2d at 1539.[8]

Finally, in *Thornton* v. *Coffey*, the court upheld the application of Title VII to the Oklahoma National Guard's failure to hire the plaintiff for "a civilian job" as equal employment officer. 618 F.2d at 689. The court held that relief was precluded, however, as to claims "based directly or indirectly" on the plaintiff's failure to receive a military promotion. *Id.* at 693. Thus, as petitioner acknowledges (Pet. 6), the analysis in *Thornton* "closely parallels" the decision below.

2. The court of appeals correctly held that "Title VII coverage of civilians employed by the military encompasses actions brought by Guard technicians except when the challenged conduct is integrally related to the military's unique structure." Pet. App. A-11.

Petitioner correctly observes (Pet. 19-23) that the courts of appeals have differed in their treatment of the question of the justiciability of military disputes in some contexts.[9] In the context of Title VII suits

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[8] The court distinguished cases such as *Calhoun* v. *Doster*, 324 F. Supp. 736 (M.D. Ala. 1971), in which the plaintiff "held two separate and identifiable positions: one as a civilian employee and the other as military personnel." 821 F.2d at 1540 n.2.

[9] See, *e.g.*, *Wright* v. *Park*, 5 F.3d 586 (1st Cir. 1993) (finding claims under 42 U.S.C. 1983 and 1985, 5 U.S.C. 2301-2302 (1988 & Supp. V 1993), and state law to be nonjusticiable); *Knutson* v. *Wisconsin Air National Guard*, 995 F.2d 765 (7th Cir.) (Section 1983 claim nonjusticiable), cert. denied, 114 S. Ct. 347 (1993); *Jorden* v. *National Guard Bureau*, 799 F.2d 99 (3d Cir. 1986) (Section 1983 claim for injunctive relief justiciable), cert. denied, 484 U.S. 815 (1987); *Trerice* v. *Summons*, 755 F.2d 1081 (4th Cir. 1985) (*Bivens* claim barred by doctrine of

by National Guard technicians at issue here, however, the courts of appeals have uniformly held that technicians may not challenge adverse personnel decisions that are integrally related to the military's unique structure. See *Stinson* v. *Hornsby*, 821 F.2d at 1539-1540; *Taylor* v. *Jones*, 653 F.2d at 1200; *Thornton* v. *Coffey*, 618 F.2d at 692.

3. The court of appeals' holding is also consistent with this Court's decisions regarding the justiciability of disputes arising from the military's unique internal structure. The Court has frequently stated that substantial discretion must be afforded to the military in molding an effective fighting force. See, *e.g.*, *Brown* v. *Glines*, 444 U.S. 348, 360 (1980). "To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). Accordingly, the Court has been reluctant to intervene in any matter that "goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman." *United States* v. *Shearer*, 473 U.S. 52, 58 (1985) (footnote omitted). The "complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan*, 413 U.S. at 10.

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intramilitary immunity); *Schultz* v. *Wellman*, 717 F.2d 301 (6th Cir. 1983) (reviewing Section 1983 claim for reinstatement).

In light of those principles, the court of appeals correctly declined to presume that a remedial statute of general applicability in civilian contexts applies identically to military decisions. See *Feres* v. *United States*, 340 U.S. 135 (1950) (declining to apply Federal Tort Claims Act to suits by service members for service-related injuries); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953) (declining to review propriety of duty assignment); *Burns* v. *Wilson*, 346 U.S. 137 (1953) (plurality opinion) (giving narrow interpretation to scope of federal habeas corpus relief available to service member); *Gilligan* v. *Morgan*, 340 U.S. 135 (1950) (declining to assume jurisdiction over claims implicating training, weaponry, and orders of National Guard); *Schlesinger* v. *Councilman*, *supra* (limiting ability of service member to obtain injunctive relief for alleged wrongs, including constitutional violations).

4. Contrary to petitioner's suggestion (Pet. 27), the conclusion that he may not pursue his claims of discrimination incident to military service under Title VII does not leave National Guard members without a meaningful remedy when they allege instances of individual or systemic discrimination. Avenues of administrative and judicial relief are available for Guard members who allege that they have suffered unlawful discrimination.[10]

For example, National Guard Regulation (AR) 600-21 (1993) prohibits discriminatory treatment and provides procedures for formal investigation where a

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[10] In addition, the court of appeals' decision acknowledges that a Title VII remedy is available to a National Guard technician who challenges a personnel decision that is not integrally related to military service. Pet. App. A-11.

Guard member claims to have suffered discrimination. The National Guard Bureau, a joint bureau of the United States Departments of the Army and Air Force, see 10 U.S.C. 10501, is empowered to review investigations conducted by state National Guard units regarding claims of discrimination. Where the Bureau's "administrative review reveals deficiencies in compliance with law or regulation, the case will be returned to the State for appropriate corrective action." National Guard Regulation 600-21, appendix E, subsection (g).[11]

Guard members may also seek relief for alleged incidents of discrimination from the Board of Correction of Military Records (BCMR). The Secretary of the Army, acting through the BCMR, is vested with plenary power to "correct an error or remove an injustice." 10 U.S.C. 1552 (1988 & Supp. V 1993). In appropriate cases, the BCMR may order that a Guard member be reinstated in comparable active federal reserve status and awarded retroactive promotion and back pay. See *Christoffersen*, 855 F.2d at 1442; *Williams* v. *Wilson*, 762 F.2d 357, 360 & n.6 (4th Cir. 1985).

If a service member believes that the BCMR failed to provide adequate relief, he or she may then seek redress in federal court. BCMR decisions are subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 551-559 (1988 & Supp.

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[11] See also 32 U.S.C. 709(e)(5) (1988 & Supp. V 1993) (providing right of appeal to state Adjutant General for National Guard technicians who are terminated from employment); 10 U.S.C. 938 (providing service members, including Guard members in federal service, with an administrative procedure for asserting grievances and seeking redress for alleged injuries by superior officers).

V 1993). BCMR decisions may be set aside if they are arbitrary, capricious, or not based on substantial evidence. See *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983). Petitioner failed to utilize any of these remedies. Pet. App. A-17.

5. Finally, petitioner's[1] contentions that "the Ninth Circuit construed the allegations of the complaint too narrowly" (Pet. 24), and that the personnel decisions at issue here do not implicate military discipline and readiness issues (Pet. 24-25) concern the particular facts of this case and do not warrant further review.[12]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] Nor, contrary to petitioner's contention (Pet. 26), is certiorari warranted to resolve allegedly inconsistent decisions of the Ninth Circuit. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).